UNITED STATES
v.
NORMAN MONTGOMERY ET AL.

IBLA 82-504 Decided August 31, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring the Goldfield lode mining claim null and void.

Affirmed as modified.

1. Administrative Procedure: Hearings--Mining Claims: Contests--Rules of Practice: Hearings

   If, prior to summary dismissal of a mining contest complaint, a contestee answers without questioning the service, any defect in service will be deemed waived as to such answering contestee.

2. Mining Claims: Contests--Practice Before the Department: Persons Qualified to Practice

   An owner of a mining claim who purports to represent the interests of other co-owners may only properly represent the interests of other claim holders if such owner meets one of the qualifications set out in 43 CFR 1.3(b).

3. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally

   Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing a discovery of valuable mineral deposit by a preponderance of the evidence.

APPEARANCES: Hubert E. Kelly, Esq., Phoenix, Arizona, for appellants; Fritz Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On July 10, 1981, BLM issued a contest complaint involving the Goldfield lode mining claim and naming Jack R. Turnbull as contestee. The complaint charged that:

> 1. Valuable minerals have not been found within the limits of the claims [sic] so as to constitute a valid discovery within the meaning of the mining laws.
>
> 2. The land within the Goldfield lode mining claim is nonmineral in character.
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> 3. Said claim was not timely filed under Sec. 314 of Public Law 94-579, (43 U.S.C. 1744) Federal Land Policy and Management Act of October 21, 1976 and therefore, are [sic] deemed abandoned as of October 22, 1979.

The case file contains a memorandum to the file signed by the supervisory land law examiner, dated August 3, 1981, in which it is stated:

> This morning Mr. Montgomery and Mr. Turnbull came into this office in connection with the complaint issued on the Goldfield Mining Claim. Our complaint was issued indicating Mr. Turnbull to be the owner of the claim as this ownership was reflected on the Papago records.
>
> Mr. Turnbull stated he no longer owned the subject claim and that he had transferred his interest to four other parties, one of whom was Mr. Montgomery the gentlemen [sic] who had accompanied him to this office.
>
> Mr. Montgomery then indicated that the charge was erroneous as shown on the complaint relative to the claim not being recorded under the Federal Land Policy Management Act. I checked the micro-film and found the claim to be of record under the following ownership:
>
> Norman Montgomery
> Dennis Harris
> Phil Stoffer [sic]
> Melvin Rockowitz
>
> Mr. Montgomery then stated he did not agree with any of the other charges and wanted to know his recourse.
>
> Accordingly, Mr. Montgomery filed an answer on behalf of all the new owners and asked for a hearing.

A hearing was held on December 11, 1981, at Phoenix, Arizona. At the commencement of the hearing Montgomery, who appeared on his own behalf, was asked if he was also appearing on behalf of his co-owners. He replied that he was (Tr. 3). Evidence was presented on behalf of BLM and Montgomery testified on his own behalf. On January 27, 1982, Judge Mesch rendered a decision that the Goldfield lode mining claim was invalid because it had not been perfected by the discovery of a valuable mineral deposit in lode form prior to the withdrawal of the land on May 27, 1955, for inclusion in the Papago Indian Reservation, and that it was not presently supported by a discovery of valuable mineral in lode form at the time of the hearing. A timely appeal followed.

The complaint in this case appears to have been poorly prepared by contestant. Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), provides for the recordation of mining claims by the owners thereof. 43 CFR 3833.3 provides for the filing of notice of transfer of interest. The mining claim which was the subject of this appeal had been properly recorded in October 1979 under the names of Jack Turnbull and Norman Montgomery. A document showing transfer of Turnbull's one-half interest to Dennis H. Harris, Philip K. Stoufer, and Melvin Rockowitz was filed with BLM on October 7, 1980. The memorandum to the file written by the supervisory land law examiner on the day that Montgomery visited the BLM office indicates that there was no difficulty finding the record of the claim or the owners.

When rule 43 CFR 3833.3 was proposed, the stated purpose for the section was as follows:

> The proposed rules also require that whenever the owner of a recorded unpatented mining claim * * * transfers an interest in the claim * * * his transferee must file a notice of the transfer with the BLM within 30 days after the transfer. * * *
>
> For the purpose of contests or other action taken by the United States which affect a mining claim, the proposed regulations designate the proper BLM office as the place of record. In those instances, a search of the county records will not be made and only those owners who have recorded or filed in the proper BLM office will be personally notified of such action or contest.

41 FR 54084 (Dec. 10, 1976).

[1] The record does not demonstrate that any attempt was made to serve the complaint on Montgomery or Montgomery's co-owners. Further, if Montgomery had not been informed of the issuance of the complaint by Turnbull, the contest would have had no effect as Turnbull was not an owner as that term is defined in 43 CFR 3833.0-5(e). Despite these deficiencies, Montgomery did appear at the BLM State Office, and he filed an answer. 43 CFR 4.450-5(a) provides that if, prior to summary dismissal of a complaint a contestee answers without questioning the service, any defect in service will be deemed

waived as to such answering contestee. 1/ Thus, we must conclude that since Montgomery had actual knowledge of the complaint and filed an answer, he waived any defect in service. However, we also conclude that such waiver was personal to him and that even though he purported to answer on behalf of the other co-owners, such answer could not bind those co-owners in the face of the failure of BLM to serve them properly. There is no evidence in the record that the other co-owners had actual knowledge of the complaint, and on appeal it is asserted that Montgomery could not represent their interests. Clearly, at the time the contest complaint was issued, BLM had notice that Turnbull was no longer the owner of the claim, yet it failed to serve the new owners. That failure was waived by Montgomery. There is no evidence of service on the other co-owners or of waiver of defective service by any of those three. Therefore, the interests of the co-owners other than Montgomery were not affected by the outcome of the contest in this case. This finding is necessary despite Montgomery's implication in the answer that he was representing the other owners and also his affirmative statement of such at the hearing.

[2] The regulations at 43 CFR 1.3 govern who may practice before the Department of the Interior. An owner of a mining claim who purports to represent the interests of other co-owners may only properly represent the interests of the other claim holders if he meets one of the qualifications set out in 43 CFR 1.3(b). United States v. Prock, 39 IBLA 148, 149 n.1 (1979). There is no evidence in the record that Montgomery was qualified under any of the categories of the regulation. Therefore, he was prohibited by regulation from representing the other co-owners. See United States v. Gayanich, 36 IBLA 111 (1978). Since none of Montgomery's co-owners was served with the complaint, and there is no evidence that Montgomery was eligible to represent their interests, the contest proceeding had no effect on their interests in the claim. 2/

The only charge in the complaint upon which evidence was presented at the hearing was whether there was a discovery of a valuable mineral deposit within the limits of the Goldfield lode claim. 3/ Pursuant to the mining laws of the United States, the locator of a mining claim is entitled to purchase land containing a valuable mineral deposit. 30 U.S.C. § 22 (1976). A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313

1/ The provisions of 43 CFR 4.450-5(a) govern private contests; however, these provisions are made applicable to Government contests by 43 CFR 4.451-2.

2/ Counsel for BLM argues that Montgomery represented all the co-owners. However, counsel does not address the effect of 43 CFR 1.3. He relies on Montgomery's representation in the answer and at the hearing. Also, even though Montgomery listed P.O. Box 941, Coolidge, Arizona, 85228, in the answer as the mailing address for all the co-owners, the contest complaint was never served at that address. Montgomery's waiver of the defect in service was personal to his interest. See 43 CFR 4.450-5(a).

3/ The Government withdrew charge number 3 of the complaint (failure to timely file the claim under FLPMA) at the hearing (Tr. 5-6).

(1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The court stated in Coleman, supra at 603, that "the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former." Where the land is closed to the location of a mining claim, as in this case, the claim must be supported by discovery at the time of the withdrawal, United States v. Montapert, 63 IBLA 35 (1982), and at the time of hearing. United States v. Jones, 72 IBLA 52 (1983).

[3] Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing a discovery of a valuable mineral deposit by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The Government presented the testimony of a qualified consulting geologist, Charles L. Fair. He visited the claim on two occasions and his associates were on the claim one time previous to his visits (Tr. 13). Fair found mineralized quartz veins on the claim (Tr. 14-15). In June 1977 Fair and an associate took a sample in a small inclined shaft on the claim (Tr. 16-17). Fair's associates had taken a sample in the shaft on an earlier visit to the claim; however, Fair felt that that sample did not constitute a mining width and, therefore, was not representative. He identified the first sampling site on his visit to the claim at which time, Fair and his associate took the second sample (Tr. 18-19). As to that sample, Fair testified that it was cut "three and a half feet across the entire lode structure" (Tr. 20). He stated that the lode structure consisted of several quartz veins with country rock in between, and the sample cut across all the exposed veins (Tr. 20). He provided further testimony concerning how the sample was taken (Tr. 21). He testified that the assay results of the second sample showed "in ounces per ton; for gold .00125, for silver .25 ounces per ton, and for copper that would be .069 percent" (Tr. 21).

The sample taken by his associates had also been assayed (Tr. 20). It showed slightly higher values than the second sample (Tr. 22). In arriving at his evaluation of the claim, Fair used the values from both samples by applying "a standard procedure for averaging any number of samples taken on the same vein, and very briefly what's done is the width of the sample is multiplied times the assay" (Tr. 22).

He concluded that the total value per ton of the three metals (gold, silver, copper) based on 100 percent recovery would be $36.55 per ton based on current prices. 4/ He stated that, of course, 100 percent recovery would

4/ The dissent indicates that Fair erred in his calculations concerning the value per ton of copper. However, even with the error, the increased total value per ton of the three metals ($42.93 rather than $36.55), based on 100 percent recovery, would still not approach the estimated mining and

be impossible (Tr. 23). He estimated that "the cost of mining and milling would be approximately three times what the value of the rock is as ascertained by our two samples" (Tr. 25). Since one of the issues concerned whether there was a discovery on the claims as of May 27, 1955, the date the land embraced by the claim was closed to mining location and included in the Papago Indian Reservation (Tr. 6), Fair testified concerning the costs of mining in 1955. He again calculated that the values projected from the claim were approximately one-third what the estimated costs of mining and milling would have been (Tr. 27).

Based on his education, experience, examination of the claim, and the assay results of sampling he expressed the opinion that the lode mineralization found within the claim was not such as to warrant a prudent person, either at the time of the hearing or at the time of the withdrawal in 1955, in the expenditure of his labor and means with a reasonable prospect of success in developing a paying mine (Tr. 28). This conclusion was based on his expert opinion that the lode mineralization exposed within the claim was not sufficient to meet the costs of a mining operation for the claim. Fair also testified that he found no geologic indications that a sufficient quantity of mineralized material existed to warrant establishing a mining operation (Tr. 50). He stated that he was unable to trace any vein in the quartz structure further than about 25 feet (Tr. 49).

Judge Mesch found that the testimony of this expert witness constituted a prima facie case of lack of discovery of a valuable mining deposit on the Goldfield lode claim. We agree.

Montgomery was the only witness to testify in support of the mining claim. He testified that the Goldfield lode claim was situated in the midst of a group of placer claims in which he had an interest (Tr. 33). He stated "the values on this Goldfield property is in the placer" (Tr. 31). He further stated that the "biggest values on this property is in placer gold * * * not in the lode, although this was staked at a lode claim originally and there is lode values on it" (Tr. 31). He commented, however, that he was principally interested in the claim because of the placer material (Tr. 41).

Montgomery produced one page of a multiple page letter referring to a placer sample that was taken on the Goldfield Lode claim (Tr. 32-33; Exh. A). He also testified that a considerable amount of money had been spent to remove overburden, drill wells, build a mill, and purchase machinery to develop the placer gold deposit (Tr. 33-34). He stated that part of the stripping work relating to the placer deposit took place on the Goldfield Lode claim (Tr. 38).

Relating to the lode deposit, Montgomery presented Exhibit B which was a letter dated April 4, 1978, from Joseph M. Keane, assistant vice president for Mountain States Research & Development, relating to the assay of two samples taken from the Goldfield lode claim, one of which was taken from the shaft (Tr. 39). Montgomery testified that he accompanied a Joseph King who

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fn. 4 (continued)
milling costs. Fair stated that costs were "about $45.00 per ton to mine and about $45.00 per ton to mill" (Tr. 24).

performed the sampling and that for the shaft sample King cut across the width of the shaft. Exhibit B states, relating to that sample:

> Sample No. 1483 - Goldfield Lode Shaft
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> This sample was procured from a shaft located on the Goldfield Lode Claim. The sample was observed to consist of quartz gangue with galena and chrysocolla mineralization. The sample assayed at 1.9 percent lead, 2.7 percent copper, 0.016 ounces per ton gold, and 21.28 ounces per ton silver. The silver and lead were probably co-precipitated and the assays indicate that 11.2 ounces per ton silver are contained per percent lead.

The letter concludes that "further exploration should be conducted in the Goldfield shaft area."

Montgomery testified concerning the quantity of lode mineralized material that, contrary to Fair's assertion that no vein extended more than 25 feet, the "vein does continue on for half a mile" (Tr. 51).

In his decision Judge Mesch presented the following evaluation of the evidence presented by Montgomery:

> The contestee attempted to present evidence in support of an assertion that the "values on this property is in placer gold." (Tr. 31). The evidence was excluded because, as stated in Cole v. Ralph, 252 U.S. 286 (1920), "[a] placer discovery will not sustain a lode location, nor a lode discovery a placer location". See also United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974).
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> The contestees' case, on the question of whether a valuable mineral deposit in lode form has been found within the claim, consisted of a letter [Exh. B] from a third party reporting that a sample taken from a shaft on the claim showed, among other values, 21.28 ounces of silver per ton of material. At the time of the hearing, the price of silver was around $9.00 an ounce. This would mean that the sampled material had a value in excess of $190.00 per ton. With values of that magnitude, it is difficult to understand why the claim, at least in recent years, has not been the subject of a mining operation, or at least extensive exploration activity in an attempt to ascertain whether the mineral values exist in sufficient quantity to warrant a mining operation.
>
> The letter submitted by the contestees is not sufficient to support the conclusion that a valuable mineral deposit has been found within the claim. The content of the letter was not subject to being tested by cross-examination at the hearing. The letter was not supported by any evidence establishing its reliability. The assay values are meaningless without supporting evidence showing how the sample was taken and what the sample

> purports to show from the standpoint of the amount of the mineralization found in the sample that might be available for extraction in a mining operation. No objective person could conclude from the letter that a mineral deposit has been found within the claim that is valuable for mining purposes. A person of ordinary prudence would certainly not be justified in spending time and money in the development of a mine and the extraction of the mineral on the basis of the letter presented by the contestees.

(Decision at 3).

We believe that Judge Mesch properly evaluated this evidence. He gave no weight to Exhibit A which related to a placer sample taken from this lode claim. In addition, he excluded evidence relating to placer gold values because a placer discovery will not sustain a lode location. Cole v. Ralph, 252 U.S. 286 (1920). He also gave little weight to Exhibit B because of the inability to conduct a cross-examination concerning the content of the letter. He found the values expressed in the letter to be meaningless without supporting explanatory evidence. Appellant presented no evidence of what the sample purported to show from the standpoint of the amount of the mineralization found in the sample that might be available for extraction in a mining operation.

Judge Mesch correctly concluded that there was a failure to establish by a preponderance of the evidence the existence of a valuable mineral deposit in lode form. We believe that Judge Mesch's conclusion was based on his analysis of the evidence which is supported by the record. 5/ We affirm the Judge's decision to the extent it declared the claim null and void as to Montgomery's interest.

We note that the dissent discusses the presumption raised by lack of development and how that presumption is rebutted in this case. However, we do not believe the Judge relied on that presumption in reaching his conclusion in this case. 6/ In fact, there was no need to do so. He concluded

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5/ We wish to note that the dissent has raised some legitimate questions concerning the testimony of Fair. As highlighted in the dissent, Fair's mathematical miscalculations, his lack of knowledge of the depth of the shaft (after testifying that it was approximately 15 feet deep), and the other record inconsistencies reveal a certain lack of professionalism in the examination of this claim and preparation for this case.

While these factors tend to weaken the case presented by the Government, we do not believe that the Government's prima facie case was destroyed or that the claimant presented sufficient evidence to meet his ultimate burden of establishing a discovery of a valuable mineral deposit by a preponderance of the evidence.

6/ Although Judge Mesch in his discussion of Exhibit B does express concern over why exploration activity had not been undertaken to ascertain whether sufficient quantities of mineralized material existed on the claim, that comment does not rise to the level of relying on a presumption to reach his conclusion.

based on the evidence that BLM established a prima facie case of lack of discovery of a valuable mineral deposit, and that there was a failure to overcome that showing by a preponderance of the evidence.

The dissent states that the presumption "arises most often when the claimant demonstrates that there is mineral in place which shows sufficient value to support a discovery." The presumption does not, however, most often arise in that situation. As discussed in United States v. Hess, 46 IBLA 1, 7-8 (1980), the presumption of invalidity may arise where there is an absence of development over a long period of time. Thus, the presumption may arise when the Government presents evidence of lack of development, or when the evidence, as a whole, shows such lack of development. If unrebutted, that evidence may serve as an independent basis for determination.

In this case the Government did not attempt to establish invalidity through presentation of evidence directed toward giving rise to the presumption. In addition, although the dissent indicates that the presumption relates to the claimant's evidence ("claimant demonstrates"), the presumption ordinarily arises based on the evidence produced by the Government, i.e., lack of development over a long period of time establishes a prima facie case. The presumption having arisen, it is subject to rebuttal by relevant evidence. However, the Judge did not rely on the presumption in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Bruce R. Harris
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN PART, DISSENTING IN PART:

I agree with the determination of my colleagues with respect to their finding that the service was not perfected against the owners other than Montgomery and their determination that Montgomery waived the defects in service. I cannot agree with their determination that the claimant, Montgomery, did not sustain the burden of proof regarding the validity of the Goldfield mining claim.

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present a case which preponderates sufficiently to overcome the Government's prima facie case on those issues raised for the evidence. 1/ United States v. Hooker, 48 IBLA 22 (1980); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). A prima facie case does not impose a burden upon a claimant to prove an element of discovery which has been conceded or which has not been raised by the contestant, i.e., if the contestant chooses to base its entire case on the lack of sufficient quality to support discovery, and presents no evidence with respect to quantity, the claimant need not come forward to prove that there is sufficient quantity of valuable mineral. The claimant can carry the burden by coming forward with evidence to demonstrate sufficient quality.

The majority has determined that Judge Mesch properly evaluated the evidence. They conclude that claimant's Exhibit B should be given little weight. On the other hand great weight has been given to the testimony and Exhibits presented by the Government witness.

Attached to contestee's Exhibit B are two assay reports. The assay reports with respect to the sample identified as 1483 Goldfield lode shaft contains the following values: Au--0.016 ounce per ton; Ag--21.28 ounces per ton; Pb--1.9 percent; Cu--2.7 percent. 2/ Judge Mesch stated that the assay

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1/ The burden imposed upon the claimant, found on page 2 of Judge Mesch's decision, is as follows:

"When the Government contests the validity of a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case. A prima facie case is made when a qualified mineral examiner testifies that he has examined the claim and found no mineralization sufficient to warrant exploitation. If a prima face case is presented, the mining claimant then has the burden of showing by a preponderance of the evidence that the claim is valid, i.e., that he has actually found a mineral deposit of sufficient quantity and quality to justify the development of a mine. Hallenbeck v. Kleppe, supra [590 F.2d 852 (10th Cir. 1979)]; United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Porter, supra [37 IBLA 68 (1978)]."

2/ Using Fair's testimony regarding market value of the precious metals and metals the value of the sample is as follows: Au--$6.40 per ton; Ag--$191.52 per ton; Pb (at $0.30 per pound)--$11.40 per ton; Cu--$43.20 per ton; Total value--$252.52 per ton. Assuming that Fair's estimate of mining and milling costs are correct (and not also subject to errors of math and erroneous

values are meaningless without supporting evidence showing how the sample was taken and what the sample purports to show from the standpoint of the amount of mineralization found in the sample that might be available for extraction in a mining operation. If the assays were to stand alone, this would be true. An examination of the transcript and a comparison of the testimony of Fair and Montgomery will, however, illuminate why I have difficulty with this determination.

If there was no basis for giving the assay presented by Montgomery any weight, there is no basis for giving Fair's assays any weight.

The Government witness, Fair, was not a mineral examiner but was a consultant hired by the Bureau of Indian Affairs (Tr. 11). Montgomery was one of the owners of the claim (Tr. 3).

The Government introduced two assays (Exhs. 5, 6). Fair, the only witness who testified on behalf of the Government, testified that he was not present when one of the two samples was taken (Tr. 18), and that while he was present when the second was taken, it was taken by Elcon who was employed by him (Tr. 16, 17). Montgomery, the only person who testified on his behalf, did not take any samples. Instead the sample was taken by a consultant who was employed by him (Tr. 39).

While Fair did not observe how the first sample was taken, he did testify with respect to how the second was taken, based upon his observations at the time it was taken (Tr. 16). On the other hand, Montgomery was present at the time that the sample was taken and testified as to how the sample was taken based on his observations at the time that it was taken (Tr. 39, 40).

Fair testified with respect to where the second sample was taken and introduced photographic evidence as to where the second sample was taken (Tr. 17; Exh. BLM-4). Montgomery did not introduce any evidence showing where his sample was taken. Instead, he identified the location by reference to the exhibit introduced by the contestant (Tr. 39; Exh. BLM-4).

While Fair could not testify with respect to his firsthand knowledge that the first sample was delivered to the assayer, who was not a member of his firm, he testified that the first and the second were in fact delivered and that the assays were of the samples taken (Tr. 19, 21). On the other hand, the Montgomery assay was conducted by the consulting firm hired by Montgomery and the face of the assay identified the sample (Exh. B).

Exhibits 5 and 6, the assay reports submitted by the Government, were signed by a certified assayer. An examination of the assay reports attached to claimant's Exhibit B discloses that the assay reports were signed by a certified assayer.

Judge Mesch stated that he found that "[t]he contestant presented testimony of a qualified consulting geologist, who, based upon his education,

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fn. 2 (continued)
assumptions or achieved using improper methods) the sample clearly represents mineral of sufficient quality that a prudent man would pursue.

experience, examination of the claim and the assay results of sampling, expressed the opinion." (Emphasis added.) However, he found that the claimant's assays were "meaningless without supporting evidence." Judge Mesch erred.

The examination of the evidence with respect to the samples discloses that Fair took the second sample because he believed that the first sample was "not representative" (Tr. 18). The first sample was taken at a point designated by Turnbull, one of the owners at the time the sample was taken (Tr. 12, 18). The first sample had a representative value of more than $150 per ton without lead added. The sample taken by Fair was not at the point selected by an owner (Tr. 20) and an owner was not present at the time of sampling (Tr. 16). No evidence was introduced showing the length of the first sample as measured at the time that the first sample was taken. Fair testified that the first sample was about 14 inches long (Tr. 18) and he could see where it had been removed (Tr. 18). (See however, the discussion of the examination of the site below.) Fair introduced no evidence to support this statement but did use the 14-inch length when weighing samples (Tr. 22).

When estimating the value contained for copper Fair testified that the copper present was 0.42 percent, and using $0.80 copper he calculated the value to be $0.34 per ton (0.80 x 0.42). This was in error. The calculation is $0.80 per pound x .0042 ton x 2,000 pounds per ton or $6.72 per ton. Further, if Fair had underestimated the length of the first sample by as little as 4 inches, the weighted average grade would be 0.0039 ounce of gold per ton, 4.57 ounces of silver per ton and 0.47 percent copper, or $50.93 per ton, over 10 percent above his estimated mining cost.

Government witness Fair testified that there was sufficient lead ore in the area of the sampling that it could observe and identify (Tr. 20), no assay of lead was made. Therefore, the claimant's finding that there was 1.5 percent lead in the lode is unrefuted. If the lead values were added to the values calculated by Fair (as corrected) the value of the ore would be in excess of Fair's estimated mining cost.

Fair gave the following testimony with respect to how the sample was taken:

> Q. And how was the sample taken?
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> A. These are taken as rock chip channel. In this technique we draw a line across the vein that we want to follow as a sample, and then using the hammer, or a hammer and chisel, we go down that line chipping pieces of the rock out. We try to get a quarter to half inch deep and maybe up to a quarter inch wide if we can, and we catch these chips either in a bag or on a canvass and put them in a bag. [Emphasis added.]

(Tr. 20-21).

The Field Handbook for Mineral Examiners (U.S. Government Printing Office: 1962 0-642918) describes the method for taking a channel sample as follows:

> Channel samples
>
> The usual method is to cut a uniform channel 3 to 6 inches wide and 1 or more inches deep across the section to the sampled. This method should ordinarily be used for property appraisals in eminent domain cases and for special validity cases involving properties which have been producing mines, or where there is need for special precautions. [Emphasis added.]

Fair's second sample was improperly taken and should, at the most, be given very little weight. It is interesting to note that the first sample, taken by the employee of Fair, and the Montgomery sample correlate very well. In fact, the first sample tends to confirm the Montgomery assay.

Fair testified that the second sample was of the full width of the lode. 3/ As this testimony is important with respect to there being a lode, and not a vein, it is quoted in its entirety:

On direct;

> Q. So in June you and Mr. Elcon went back and you took another sample.
>
> A. Yes.
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> Q. Where did you take that sample?
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> A. It was a few feet above the sample site taken by Downy and Platt, and my sample was three and a half feet across the entire lode structure and this is indicated on the photo that was just submitted as an exhibit.
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> The lode structure in the shaft is actually--it actually consists of several quartz veins with rock, country rock in between. So we tried to cut across all of the quartz veins that were actually exposed in the incline shaft.

(Tr. 20).

On redirect;

> [A.] This particular claim, you sort of maybe have to visualize this if you can, it really amounts to a small hill that

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3/ The record, and Fair's testimony is somewhat confusing with respect to the factual nature of the one sample observed being taken. There is no way to tell the width of the lode as shown on Exhibit 4, as it is a picture with a man showing the width by outstretched arms. It appears that the width is easily more than 3-1/2 feet. If this is so, the statement by Fair that he "cut across all of the quartz veins that were actually exposed" (Tr. 20) would indicate that he did not sample the intervening country rock.

pokes up through a large area of sand and gravel. The sand and gravel contain the placer values that Mr. Montgomery has alluded to, but the small hill is actually the bedrock, the country rock, and this particular country rock does not cover the entire claim. Again as Mr. Montgomery has said, there is sand and gravel on the claim which he's found placer values.

So we have a relatively small, much smaller than 20 acres because that's the size of the claim, we have a small outcrop of bedrock or country rock that contain these quartz veins, and it's these upon which the lode character is to be determined. Well, the structure, the lode structure, as I testified earlier, consists of a series of small quartz veins which are contained within a certain width. It's the width of this entire section that we call the lode, and one vein is called that, a vein. So you have a structure, but it's mostly the quartz itself that contains the metal values. The intervening country rock usually is not mineralized, occasionally it is.

So we made an effort on the surface to follow the quartz veins, and we were not able to trace any individual quartz vein further than about 25 feet.

Now normally you would expect maybe these things would run out and be covered with sand and gravel, but these actually terminated before you even got to the edge of the sand and gravel.

We use a normal, or a rule of thumb when we're trying to estimate tonnage of assuming--we usually assume that the downward projection of a vein will be no more than the lateral extent. In other words, you're dealing with a small pod or a small ore chute, that if it's 25 feet wide on a surface, it probably won't be any deeper than 25 feet below.

But to be safe we normally multiply it by two to give the benefit of the doubt situation. I had made some original calculations using this and the depth as exposed in the shaft. Now, Mr. Montgomery probably is right on the depth of the shaft. I didn't go down in it. I took the depths from my assistant who looked down in it. I thought he climbed down in it, but using the 65 feet, instead of the original depth that I used, and considering that the surface extent is 25 feet, which I'm much more certain of than I am the depth of the shaft, you have at best a vein that's 50 feet long, 65 feet deep, and three and a half feet wide. That's all you can trace.

This calculates out to about 948 tons. Now if the quartz vein had run the length of the outcrop and gone under the sand and gravel, then we would have been on much shakier ground, but the quartz vein itself, or the series of quartz veins, does not appear to be strong and constitutes less than a thousand tons of mineralized material. So that whatever the assay value, whether Mountain States value is more nearly correct than mine, whatever

the value, the contained tonnage is very low and in my opinion still does not justify a prudent man to try to continue in hopes of developing a mine because I don't think the structure is there.

A mineralized structure can have local hot spots of very high values as far as assay goes. But you have to be able to develop some tonnage to have some hopes of developing a paying mine.

JUDGE MESCH: Do you have any questions?

MR. MONTGOMERY: There is one question.

RECROSS EXAMINATION

BY MR. MONTGOMERY:

Q. You say that that quartz mineralize zone ends at that point which it don't. It runs on west clear into the Esperanza.

A. Under the gravel?

Q. Well, it's not in the gravel. On the north end of that claim it comes back into your granite, and we have done some trenching up in there and it does continue on over into the Esperanza Claim.

A. Well, all I can testify to is what I saw when I was on the ground.

Q. It goes into the gravel.

A. I walked it out and I ran out of it even before I got to the gravel.

Q. Well, that hill extends maybe 20 feet above the wash and it goes right straight into the sand wash. So you couldn't trace it very far without walking right straight into the wash.

A. That's true, I didn't go very far, but I ran out of quartz.

Q. The vein does continue on for half a mile.

JUDGE MESCH: I guess that's all then, Mr. Fair.

(Tr. 47-51).

The provisions of 30 U.S.C. § 23 (1976), recognize that a lode mining claim can be located on a vein or lode. A lode is distinguished from a vein in that "[a] lode consists of several veins spaced closely enough so that all of them, together with the intervening rock can be mined as a unit."

Dictionary of Mining, Mineral and Related Terms (1968). The importance of a lode was recognized in 1872.

As can be seen, Fair recognized the existence of a lode. Fair also testified that while in his experience in most cases the valuable minerals were contained in the quartz, this is not always the case. He presented no testimony that all of the valuable minerals were contained in the quartz and not contained in the "intervening country" of the lode. He also admitted that he only attempted to trace an individual vein within the lode and did not attempt to trace the lode. The testimony he presented was that the quartz veins did not continue for sufficient distance to establish a mineralized body of sufficient size to justify a man of ordinary prudence to expend time and money in the development of a mine and the extraction of mineral.

Fair testified as to the size of the mineralized body, based upon his observations. He also testified that he traced a quartz vein 25 feet but did not trace the course of the lode (Tr. 51). He testified that the inclined shaft was 15 feet deep (Tr. 15). Then after the claimant testified that the shaft was 65 feet deep, he admitted that he had not inspected the shaft, that he did not know its depth and that Montgomery was probably right with respect to its depth (Tr. 49).

Fair gave the following testimony when presenting the Government's case:

> Q. I hand you what's been marked BLM-3 and ask you to identify it.
>
> (Whereupon the above mentioned exhibit was marked for identification.)
>
> A. This is a sketch that was made which shows the relationship of the shaft within the claim itself. It shows the claim boundaries. It shows the outline of the shaft and it shows the mineralized quartz veins. They're indicated as lines going across the claim. It shows their direction, north being at the top of the figure and the dip of the vein which is 60 degrees northeast.
>
> Q. Does the sketch correctly portray what it purports to show?
>
> A. Yes, it was a sketch made on the ground and shows that we found.

(Tr. 15).

The vein shown on Fair's map is shown to be over 300 feet long. Later, after Montgomery had introduced evidence of high values, Fair testified that the vein was only 25 feet long (Tr. 48-49).

On the other hand, while it was obvious that Montgomery was not familiar with the law or experienced as a witness, he demonstrated a knowledge of the property and a tenacious adherence to his line of testimony.

As noted in the majority opinion, I find it difficult to believe that Judge Mesch was not influenced by the fact that no development had taken place with respect to the lode deposit. By his statement he acknowledges that if this assay is acceptable, the claimant has demonstrated sufficient quality to support his discovery. Coupled with this conclusion was the error in not admitting evidence with respect to the work that had been done developing the placer deposit on the claim and the adjacent claims.

This Board has correctly held that a presumption is raised that a claimant has failed to discover a valuable mineral deposit if there has been little or no development or operation on the claims over a long term. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982); United States v. Hess, 46 IBLA 1 (1980); United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980). This presumption arises most often when the claimant demonstrates that there is mineral in place which shows sufficient value to support a discovery but has not physically blocked out appreciable reserves to clearly carry the burden with respect to having sufficient quantity of ore, or when sufficient quantity is shown but the value appears to be marginal. The basis for this assumption is that a prudent man would go forward to develop an ore body if the value or quantity of the mineral in place was sufficient to warrant doing so unless the mineral deposit is of such a nature that, while there are high values or a large low grade reserve, the quantity or quality of ore that a reasonable man could expect to find would not justify development. Therefore, there is a valid basis for overcoming this presumption when a claimant owns a contiguous group of claims containing more than one deposit and is actively pursuing the deposit which demonstrates potential for the greatest and/or earliest return of capital. To do otherwise could only be based on the assumption that claimant has unlimited capital available to him. This assumption is obviously erroneous. The evidence which was allowed, including testimony that in excess of $150,000 had been expended on or for the benefit of the claims since Montgomery acquired his interest (Tr. 33-34) adequately overcomes any presumption that there was no discovery because of a failure to develop the claim.

In summary, after an examination, I find Montgomery's testimony to be more credible than that given by Fair. Fair, who was versed on courtroom procedure and the law, as it applies to this case, gave testimony which was inconsistent, inaccurate, and clouded by his admissions that certain of the facts upon which he relied in making his determination had not been observed by him. His sample techniques were, at the most, faulty--throwing serious doubt as to the acceptability of the assay results therefrom. His testimony was phrased as if it was based upon his firsthand knowledge, not as if it was his conclusion based upon evidence prepared by others. As he did not, in fact, rely on firsthand knowlege his testimony becomes, as Judge Mesch stated, "meaningless without supporting evidence." While Montgomery was not familiar with the law as it applies to discovery, his was able to present testimony that he was familiar with the property, with mining, the time and money which must be expended in the development of a mining claim on a prudent basis, and demonstrated that there was mineralization on the property of

sufficient quality using mining costs presented by the Government witness. The Government witness recognized that the shaft penetrated a lode which went for some distance and did not choose to take additional samples which would disprove his statement that the valuable minerals could be contained in the intervening country rock. 4/ Using the method of calculating tonnage used by the Government witness and the admission that the lode extended much further than the distance used by him I find that Montgomery overcame the Government case of insufficient quantity. The claimant's sample was for the full width of the shaft (Tr. 40). The Government case that there was insufficient quantity was overcome by Exhibit BLM-3, the admission of the Government witness that the lode structure extended beyond the quartz vein he traced, and the Government's witness' admission that there could be valuable minerals in the nonquartzitic portion of the lode. 5/

The majority decision in this case recognizes that there are legitimate questions concerning the testimony of Fair. See note 5 to majority opinion. In light thereof, I find it difficult to understand the basis for their determination that Judge Mesch's decision should be affirmed. Judge Mesch stated:

> The contestant presented the testimony of a qualified consulting geologist who, based upon his education, experience, examination of the claim, and the assay results of sampling, expressed the opinions that the lode mineralization found within the claim was not such as to warrant a prudent person, either at the present time or at the time of the withdrawal in 1955, in the expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. The witness arrived at these opinions because the value of the lode mineralization exposed within the claim was not sufficient to meet the costs of a mining operation suitable for the property. In addition, he found no geologic indications that there was a sufficient tonnage of the mineralization to warrant a mining operation. [Emphasis added.]

The legitimate questions recognized by the majority relate so directly to those portions of Judge Mesch's decision underlined above, that the underlying foundation for Judge Mesch's determination that the Government had established a prima facie case is so weakened (if not destroyed), that almost any reasonable evidence should preponderate a case on behalf of the appellant, regardless of the weight given. Point by point:

(a) Qualified--a recognized lack of professionalism.

(b) Examination of the claim--lack of knowledge and preparation. Testimony subsequently retracted with respect to what he had actually observed.

4/ See note 1 supra.

5/ Using the map which was "made on the ground and shows what [they] found," there was a projected block of "mineralization containing 11,000 tons, not 948 tons as Fair concluded, based upon his "observations."

(c) Sampling--contrary to prescribed practice, therefore, subject to suspicion as not being representative or accurate.

(d) Mineralization found--lead was found but not assayed, value not known or taken into consideration.

(e) Value of lode mineralization--mathematical miscalculations, improper sampling technique, failure to sample all material in lode, and failure to assay for all known valuable minerals rendered conclusion as to value meaningless.

(f) Not sufficient--one of two Government samples and claimant's sample did, in fact, contain sufficient value to overcome the Government's inflated cost estimates.

(g) No geologic indication--by Fair's own admission the lode continued beyond the point at which he had ceased his examination.

(h) Sufficient tonnage--an assumption based upon "facts" which were contradicted by his own testimony.

I find that the claimant has carried the burden with respect to the existence of a discovery. While he did not "destroy" the Government case as the majority declared he must do, he clearly overcame a poorly prepared and poorly presented case. He need do no more.

_____
R. W. Mullen
Administrative Judge